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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. ROBERT FRANCIS BAKER, JR., Defendant and Appellant.	D074463 (Super. Ct. No. SWF1601251)

APPEAL from a judgment of the Superior Court of Riverside County, Michael B. Donner, Judge. Affirmed in part, reversed in part, remanded with instructions.

Ellen M. Matsumoto, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina, Christine Levingston Bergman, and Lynne G. McGinnis, Deputy Attorneys General for Plaintiff and Respondent.

Robert Francis Baker, a 68-year-old man, followed a 12-year-old child who was walking alone on the side of a road, and repeatedly tried to persuade her to get inside his rental car. Baker was a registered sex offender who was previously sentenced to 20 years for seven counts of committing lewd acts on a child under the age of 14. Dildos, lubricants, and condoms were in his vehicle, and hundreds of images of child pornography were found on four of Baker's computers following a search of his residence.

A jury convicted Baker on five counts, including attempted kidnapping for the purpose of engaging in a lewd or lascivious act with a child under the age of 14 (count 1), possession of child pornography (count 4), and possession of child pornography by a person required to register as a sex offender (count 5). The jury determined Baker had a prior serious felony conviction, and the court sentenced him to two consecutive, indeterminate terms of 25 years to life, plus a determinate term of 10 years.

Baker does not contest there is sufficient evidence to support his conviction for attempting to commit a lewd or lascivious act on the victim, but he claims he did not have the specific intent to kidnap her using force or fear. We reject this claim, as well as his claim that the trial court erred by failing to instruct sua sponte on the lesser included offense of attempted false imprisonment. However, we vacate one count of possession of child pornography (count 4) because it is a necessarily included offense of possession of child pornography by a registered sex offender (count 5), and we remand for resentencing to allow the trial court to determine whether to strike the five-year enhancements imposed under Penal Code sections 667, subdivision (a)(1) and 1385, which were

amended after Baker's sentencing, effective January 1, 2019.[1] In all other respects, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

I

Factual Background

A. *Attempted Kidnapping of Jane Doe 1*

Twelve-year-old Jane Doe 1 (Jane) testified that, on August 12, 2016, she was walking from her middle school to the high school where her mother teaches so that her mother could drive her home.[2] A man whom Jane identified at trial as Baker, drove up, stopped about five feet behind her, and asked if she needed a ride. This made Jane feel scared, anxious, and annoyed. She said, "No, thank you," and continued walking, but Baker kept following her. He pulled alongside her so that his open passenger window was approximately a foot away from her. Jane testified, "He started talking about his mom and how he shouldn't pick up hitchhikers. He was also talking about how he was going to a dentist, and he started blabbing on about how he took a wrong turn somewhere and he ended up being on [this street], and that's all he really said." Baker started clearing a space on the passenger seat although she had already told him, "No." He told her he worked at a resort and casino as a dancer and entertainer, which made her feel even more tense, because she lived near the casino. While he was talking, Baker flicked

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1 Subsequent statutory references are to the Penal Code unless otherwise indicated.

2 Jane's twelfth birthday was two months before the incident. She testified at trial just months before her thirteenth birthday.

his tongue around his lips from side to side, which Jane interpreted as "something sexual that [he] might be thinking of." He pulled out a wad of cash, held it up to Jane, and then set it down on the dashboard. He also showed her a "gold platinum card" for a resort and casino. Again Jane continued walking away, but again Baker followed her. For 10 to 15 minutes, he continued to ask Jane if she wanted a ride. Jane estimated she told him five or six times that she was not going to get into his vehicle. As she kept saying no, she started feeling more scared, stating, "I started to feel like he may have something that could get me into his car, like a taser or something like that, because he would not leave me alone."

A senior investigator for the Riverside County District Attorney's Office testified that he was on his way to an interview related to another investigation when he saw, on the opposite side of the road, a white passenger vehicle pulled toward the roadside. Because the road was narrow with a single lane in each direction, the stopped car was partially blocking traffic and many vehicles were backed up behind it. The investigator could see the car's driver, whom he identified as Baker, leaning over the center console toward the passenger window, talking to the victim.[3] He saw Jane on the side of the road; she had a backpack on and was "clutching some books, like a binder." She stood on the shoulder, backed up as far from the car as possible without falling into the ditch

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[3] The investigator was able to observe all these details because he had turned onto the road after being at a stoplight and was just starting to accelerate. The situation was "so alarming" that the investigator deliberately slowed down to look through his windshield and then through his driver's side window to "make sure [he] wasn't misinterpreting the situation."

behind her. Although there was traffic noise, Jane wasn't leaning into the window like she was talking to somebody she knew or was trying to hear better. Her body posture was "defensive," and he immediately felt concerned for her. He testified, "whether it was the cop in me or the father in me, right away . . . every alarm went off. Just the whole situation didn't look good." He further explained that "she appeared to be in danger."

The investigator, who was driving an unmarked car, made a U-turn at the first available opportunity and pulled up behind Baker's car. He showed Jane his badge and identification. He testified she was "obviously already concerned about what was going on inside the vehicle" and "obviously uneasy." With her voice quivering, Jane told the investigator that "she didn't know this guy, that he was a stranger."

The investigator asked Baker to turn off the car and give him the keys. Baker argued that he had done nothing wrong but eventually gave the investigator the keys. Baker told the investigator that he just got done showing Jane his "credentials," i.e., his casino player's card, to prove to her that he was a "good guy" and it was okay for him to give Jane a ride.

Deputies from the Riverside County Sheriff's Department arrived on the scene. One deputy asked Baker to step out of his vehicle; when Baker did so, both the deputy and the investigator noticed that the zipper on Baker's pants was halfway down.[4] The investigator also noted that an additional "flap of material" was protruding from Baker's open zipper. The deputy testified Baker was moving his tongue around his mouth and

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4 Jane testified she could not clearly see Baker's pants or that they were unzipped. Baker was wearing a jacket. The temperature outside was approximately 80 degrees.

licking his lips continuously the whole time they spoke, and that he seemed nervous. Baker was arrested at the scene.

When Baker was searched, deputies found casino cards and a large amount of cash.

Baker's vehicle, which he had rented, was searched. Three packaged condoms were found on the passenger seat. Multiple dildos, massagers, lubricants, a woman's bra, a woman's purse, and binoculars were found in the vehicle. Food items, a steak knife, and several bottles of alcohol were also found in the vehicle.

B. *Child Pornography Found on Baker's Computers*

A search of Baker's home produced three laptop computers from Baker's bedroom and a desktop computer from the kitchen. The computers contained files depicting images of child pornography. The jurors were shown a sample of the 426 images of child pornography found on Baker's computers—the images included depictions of young children engaged in intercourse, masturbation, and sexually provocative nudity. The images included young children in handcuffs tied to beds.

C. *Baker's Subsequent Statements*

In a subsequent interview with the investigator, Baker admitted he had pulled over and asked Jane if she wanted a ride. Baker told the investigator the first thing he said to Jane was that "he wouldn't be talking to her if she wasn't over 18." Baker said he used the binoculars found in the car to look at the pool area when he stayed at casinos to identify women he might know and to identify men "that would be bad guys," whom he

would report to security. Baker also told the investigator that all four of his computers were password-protected and that no one besides him had the passwords.

D. *Evidence of Prior Serious Felony Convictions for Violating Section 288*

Jane Doe 2—now an adult—testified that she and her mother lived with Baker beginning when she was about six years old.[5] When she was nine or 10, her mother moved out but she remained with Baker who was like a father to her. Baker began molesting her when she was approximately nine years old. At first, he fondled her breasts. The abuse escalated. He made her manually masturbate and orally copulate him. Baker also told her never to tell anyone or she would never see friends or family and no one would love her again. When she was 11, Baker began forcing her to have intercourse with him. During the abuse, Baker used a vibrator on the victim's vagina, and on himself. He also gave the victim alcohol as a means to molest her.

In 1993, for his crimes against Jane Doe 2, Baker was convicted of seven counts of committing a lewd act on a child (§ 288, subd. (a)) and sentenced to 20 years in state prison. His convictions required him to register as a sex offender. (§ 290.)

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[5] The trial court allowed this evidence to be admitted based on the prosecution's pretrial motion pursuant to Evidence Code section 1108. Evidence Code section 1108 provides in relevant part: "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352."

E. *Baker's Testimony*

Baker saw Jane while he was looking for his dentist's office; he traveled about a quarter of a mile and made a U-turn; and he then saw that she was still walking.[6]

Baker rolled the passenger side window down, saying to Jane, " 'Hi, I'm Bobby. How you doin'? . . . I made a wrong turn back at the light at Margarita. I went all the way to the dead-end. I'm looking for my dentist, and I turned around and I saw you when I made the right, you were walking, and now you're way up here and on the other side of the street. You've got a big backpack on. It's hot as can be. Would you like a ride?' " When Jane told him her mother said " 'never take a ride with strangers,' " Baker said, " 'My mom told me I should never give a ride to hitchhikers. You're not hitchhiking.' " He further told her, " 'Look, I'm not a bad guy.' " Jane told Baker his dentist was " 'over the hill.' " Baker again asked Jane, " 'You sure you don't want a ride?' " She kept walking, and he kept talking to her. Baker pulled $600 out from his back pocket because the money was wrapped around some credit cards with a rubber band, and he wanted to show Jane his casino player's card "so she felt safe, I guess. . . . [¶] I sing and do comedy, and I do a lot of shows for abused kids, and I wanted her to know that."

Baker said it would have taken "another two seconds" and he would have left, but then the investigator appeared and told him to turn the car off. Baker said she never told him to get away, and he never tried to block her from moving. He explained: "I never

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6 Baker testified that he withdrew $600 to go to his dentist on the date of his arrest. He did not actually have a dentist appointment and the person he identified was not his dentist on the day of the incident. He did not use the GPS device on his phone or in the rental vehicle to locate the dentist's office.

said anything inappropriate to her. I didn't do anything inappropriate. I didn't have my zipper down or playing with myself." His zipper was down because he urinated on himself while he was trying to urinate inside a Folgers can in his vehicle and spilled all over his pants.

Baker testified that he did not know Jane was 12 and he could "barely see her" and did not care. Other times, he said "what she was wearing was not seductive." Even though he saw Jane had a backpack and she referred to something her mother told her, he claimed he did not realize he was speaking to a child. He explained, "When I was talking to her and she was talking to me," there were "[n]o bad vibes." He further explained there was nothing prohibiting him from speaking to a minor, and Jane was the first child he had talked to since he got out of prison. When he was interviewed following his arrest, he said Jane looked like she was 19, 20, or 21 years old.

When asked about the items in his trunk, he said some of the vibrators and massagers were broken, and others belonged to his 98-year-old mother. He was going to take the broken items to the store for replacements. He did not know where he purchased each item.

Baker said that he had to be somewhere by 5:15 p.m. and wouldn't kidnap anybody "with everything ready to take off in my life after years and years," referring to his aspiring singing career.

II

Procedural Background

Baker was charged with attempted kidnapping for the purpose of engaging in lewd and lascivious conduct with a child under the age of 14 (count 1; §§ 664 & 209, subd. (b)); attempted lewd and lascivious acts on a child under the age of 14 (count 2; §§ 664 & 288, subd. (a)), annoying and molesting a child under the age of 18 after having been previously convicted of a violation of section 288, subdivision (a) (count 3; § 647.6); knowingly possessing child pornography (count 4; § 311.11, subd. (a)); and knowingly possessing child pornography after having been previously convicted of an offense requiring registration as a sex offender (count 5; § 311.11, subd. (b)). It was further alleged as to counts 4 and 5, that he possessed matters portraying sexual sadism and sexual masochism involving a child under the age of 18 (§ 311, subd. (c)(2)). The information alleged Baker had one prior serious felony conviction (§ 667, subd. (a)) and seven prior strike convictions (§§ 667, subds. (c), (e)(2), 1170.12, subd. (c)(2)).

Baker represented himself at trial and declined to bifurcate the issue of his prior convictions.

The trial court used CALCRIM No. 1203 to instruct the jury on attempted kidnapping as follows:

> "A defendant would be guilty of the crime of kidnapping for the purpose of engaging in a lewd or lascivious act with a child under the age of 14 years, in violation of Penal Code section 209[, subdivision (b)] if proved that:
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> "1. The defendant intended to commit a lewd or lascivious act on a child under the age of 14 years;

> "2. Acting with that intent, the defendant took, held, or detained another person by using force or by instilling a reasonable fear;
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> "3. Using that force or fear, the defendant moved the other person or made the other person move a substantial distance;
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> "4. The other person was moved or made to move a distance beyond that merely incidental to the commission of a lewd or lascivious act on a child under the age of 14 years;
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> "5. When that movement began, the defendant already intended to commit a lewd or lascivious act on a child under the age of 14 years;
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> "6. The other person did not consent to the movement;
>
> "AND
>
> "7. The defendant did not actually and reasonably believe that the other person consented to the movement."

The jury was also instructed with CALCRIM No. 460, attempt other than attempted murder (§ 21a), and CALCRIM No. 1110, lewd or lascivious act: child under 14 years (§ 288, subd. (a)).

The jury found Baker guilty of the charged offenses and found the special allegations and prior convictions to be true.

The court imposed an indeterminate term of 25 years to life for count 1 (attempted kidnapping); imposed and stayed an indeterminate term of 25 years to life for count 2 (attempted lewd and lascivious acts on a child under the age of 14); imposed and stayed an indeterminate term of 25 years to life for count 3 (annoying and molesting a child under the age of 18 after having been previously convicted of a violation of section 288, subdivision (a)); imposed a consecutive, indeterminate term of 25 years to life for count 4 (possession of child pornography); and imposed and stayed an indeterminate term of

25 years to life for count 5 (possession of child pornography by a registered sex offender), for a total indeterminate term of 50 years to life.[7] (§§ 667, subds. (b)-(i); 1170.12.) The court further imposed a determinate term of 10 years under section 667, subdivision (a)(1).

DISCUSSION

I

Sufficiency of the Evidence: Attempted Kidnapping

Baker contends his attempted kidnapping conviction is not supported by substantial evidence that he had the specific intent to use force or fear to kidnap Jane. He claims the evidence shows he was trying to ingratiate himself and impress the victim—in an effort to gain her consent to enter his car—rather than coercing or compelling her to go with him. We find substantial evidence supports Baker's attempted kidnapping conviction.

In addressing Baker's claim, " '[o]ur role is limited. . . . We review the entire record in the light most favorable to the judgment, and affirm the convictions as long as a rational trier of fact could have found guilt based on the evidence and inferences drawn therefrom. [Citations.]' " (*People v. Medina* (2007) 41 Cal.4th 685, 699 (*Medina*).) We

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[7] The abstract of judgment erroneously reflects concurrent, not consecutive, sentencing on count 4. It is well settled that the oral pronouncement of judgment controls. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185-186 [the trial court's oral pronouncement of judgment is controlling and must be accurately reflected in the abstract of judgment].) Because we conclude reversal of count 4 and remand for resentencing is warranted, we will not require correction of the current, inaccurate abstract of judgment. Rather, we point out the inaccuracy to ensure it is not repeated upon resentencing.

must "determine whether [the record] discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] The standard of review is the same in cases in which the People rely mainly on circumstantial evidence. [Citation.] 'Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt.' " (*People v. Stanley* (1995) 10 Cal.4th 764, 792-793.) "A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support" ' the jury's verdict." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

Section 207 defines the crime of simple kidnapping as follows: "Every person who forcibly, or by any other means of instilling fear, steals or takes, or holds, detains, or arrests any person in this state, and carries the person into another country, state, or county, or into another part of the same county, is guilty of kidnapping." " 'As the language [of Penal Code section 207] indicates, the statute generally requires that the defendant use force or fear. [Citations.]' " (*People v. Daniels* (2009) 176 Cal.App.4th 304, 327.) "This does not require physical compulsion." (*People v. Alvarez* (2016) 246 Cal.App.4th 989, 1002.) "Rather, where the victim reasonably feels compelled under the circumstances to comply with the defendant's orders under fear of harm or injury from the defendant, the asportation is forcible." (*Ibid*.)

Section 209, subdivision (b) defines the crime of aggravated kidnapping for the purpose of committing enumerated sexual offenses. Subdivision (b)(1) of section 209 provides in pertinent part: "Any person who kidnaps or carries away any individual to commit . . . [a lewd or lascivious act involving a child] . . . shall be punished by imprisonment in the state prison for life with the possibility of parole."[8]

Simple kidnapping is a general intent crime (*People v. Bell* (2009) 179 Cal.App.4th 428, 435), but "aggravated kidnapping by definition requires proof of specific intent." (*People v. Dominguez* (2006) 39 Cal.4th 1141, 1151, fn. 6.) The crime of aggravated kidnapping under section 209 requires that the defendant have the specific intent when the kidnapping begins to commit the underlying offense. (*People v. Davis* (2005) 36 Cal.4th 510, 565-566.) The underlying offense in this case is commission of a lewd or lascivious act involving a child under 14 years, a violation of section 288.[9]

This case involves the attempted commission of a crime, rather than a completed crime of either kidnapping or the underlying target offense. Section 664 provides that "[e]very person who attempts to commit any crime, but fails, or is prevented or

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8 Subdivision (b)(2) of section 209 further provides, "This subdivision shall only apply if the movement of the victim is beyond that merely incidental to the commission of, and increases the risk of harm to the victim over and above that necessarily present in, the intended underlying offense." Baker does not specifically challenge these elements.

9 Section 288, subdivision (a) provides in relevant part that "a person who willfully and lewdly commits any lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony . . . ." Baker does not contend there was insufficient evidence to support his section 288 attempt conviction.

intercepted in its perpetration, shall be punished" as prescribed by law. "An attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission." (§ 21a.) "Other than forming the requisite criminal intent, a defendant need not commit an element of the underlying offense." (*Medina*, *supra*, 41 Cal.4th at p. 694; see *People v. Cole* (1985) 165 Cal.App.3d 41, 50 (*Cole*) ["since the crime here is *attempted* kidnapping, the distance [the victim] was moved is immaterial—asportation simply is not an element of the offense"].) "Although mere preparation such as planning or mere intention to commit a crime is insufficient to constitute an attempt, acts which indicate a certain, unambiguous intent to commit that specific crime, and, in themselves, are an immediate step in the present execution of the criminal design will be sufficient." (*People v. Ross* (1988) 205 Cal.App.3d 1548, 1554.) The overt act toward commission of the crime "need not be the last proximate or ultimate step toward commission of the crime or crimes." (*People v. Superior Court* (*Decker*) (2007) 41 Cal.4th 1, 8 (*Decker*).) "When [defendant's] acts are such that any rational person would believe a crime is about to be consummated absent an intervening force, the attempt is underway . . . ." (*People v. Dillon* (1983) 34 Cal.3d 441, 455 (*Dillon*).)

Here, the jury could reasonably find that Baker intended to "take[], or hold[], [or] detain[]" Jane by using force or by instilling a reasonable fear (§ 207, subd. (a)), in order to commit a lewd or lascivious act on the child. Specific intent is often inferred from circumstantial evidence. (*Cole*, *supra*, 165 Cal.App.3d at p. 48.) Baker approached 12-year-old Jane as she was walking alone along the side of a road after school. She was

carrying a backpack and books. He repeatedly asked her if she wanted to get in his vehicle. He rolled his window down and leaned through it to talk to her. He was so close that she had to back up as far as she could against a ditch behind her. Because he was blocking part of the road, cars backed up behind him while others passed him. Even after she said her mother told her not to accept rides from strangers, he persisted. He tried to lure her into the vehicle under the false pretense that he needed her to help find his dentist—even though he had no scheduled dentist appointment. He tried to convince her that he was purportedly a "good guy" by showing her his casino player's card and impressing her by holding out a "wad" of money which he had withdrawn from the bank immediately prior to the attempted kidnapping. As he was following her, he made room for her by moving items on the passenger's seat. Condoms were found on the passenger's seat. He also had numerous dildos, lubricants, alcohol, and binoculars in the trunk of his rental car. While attempting to coax her into the vehicle, he kept "flicking" his tongue in a manner the child interpreted as sexually suggestive. When he exited the vehicle after the investigator came to Jane's assistance, it was evident that his zipper was open with the inside flap of material protruding. Baker was a registered sexual offender and had a history of committing lewd acts on a child. He molested another girl when she was approximately the same age as Jane, forcing her to have sexual intercourse starting at the age of 11. He used vibrators on the child and himself, and he used alcohol to facilitate his prolonged sexual abuse. From this evidence, the jury could reasonably infer Baker intended to kidnap Jane to commit a lewd act.

Baker points out he "made no physical attempts to grab her" and "made no verbal threats . . . to get her into his car." But the fact that he had not yet resorted to physical violence or more coercive verbal commands does not absolve him of liability. Baker is charged with an attempted, not a completed, crime of kidnapping for purposes of committing a lewd act on the victim.[10] Fortuitously, his actions were interrupted by an intervening force. The investigator who witnessed the interaction between Baker and Jane was immediately concerned for the child's safety, explaining that she "appeared to be in danger," her body posture was "defensive," and she was obviously "concerned" and "uneasy." When he intervened to help her, he noted Jane's voice was quivering. Jane testified that she was fearful of the defendant and he did not stop asking her to go with him until the police came. Viewing the evidence in the light most favorable to the judgment, a reasonable jury could conclude Baker's goal was to force Jane into his vehicle, but he did not complete the crime only because the investigator intervened. (See *Dillon*, *supra*, 34 Cal.3d at p. 455 [if "any rational person would believe a crime is about to be consummated absent an intervening force, the attempt is underway . . . ."].) The jury could further reasonably find his actions—although not rising to the level of actual physical force—went beyond mere preparation and were direct but ultimately ineffectual acts to kidnap Jane by force or fear in order to commit a lewd act on the child.

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10 Baker's comparison of his conduct to that of the defendant in *People v. Majors* (2004) 33 Cal.4th 321, 331 is therefore inapt as that case did not involve attempted kidnapping. (See *id*. at pp. 323-324 [evidence that victim entered defendant's vehicle under an implicit threat of arrest was sufficient to satisfy the force or fear element of a section 207, subdivision (a) kidnapping conviction].)

Baker's argument that he was merely trying to get Jane to come "willingly and with her consent" is similarly unpersuasive. The jury was free to reject the inference Baker wants to draw from the evidence, and instead conclude Baker wanted to compel Jane to go with him. We do not reweigh the evidence and instead accept the logical inferences drawn by the jury. (*People v. Solomon* (2010) 49 Cal.4th 792, 811.) In addition, even if the victim's initial cooperation is obtained without force or fear, a kidnapping occurs if the defendant subsequently compels the victim to accompany him further. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1017-1018 [affirming conviction where victim voluntarily accepted ride, but then defendant did not let the victim out of the car].) Regardless of whether Baker tried to "ingratiate himself" or "impress" the victim, the jury could reasonably determine that Baker intended to use force or fear to compel Jane to go or remain with him, and that he would have completed the kidnapping if the investigator had not interrupted him. Baker's actions of following the child and attempting to lure her into the vehicle did not have to be "the last proximate or ultimate step toward commission of the crime or crimes" to support a conviction. (*Decker*, *supra*, 41 Cal.4th at p. 8.)

Finally, Baker relies on *People v. Stephenson* (1974) 10 Cal.3d 652 for the proposition that a defendant can be guilty of a target offense (in that case robbery) without being guilty of the kidnapping that preceded the target offense. Here, Baker contends he cannot be found guilty of kidnapping Jane merely because he is not contesting that he specifically intended to commit a lewd act on her. But that is not what happened. The jury was properly instructed on the specific intent required for an

attempted kidnapping offense. The evidence was sufficient to show Baker had the requisite intent to commit *both* crimes. Acting with an intent to commit a lewd act on Jane—which Baker does not dispute on appeal—the jury could reasonably infer that he intended to "take[], or hold[], [or] detain[]" her by using force or instilling fear. (§ 207, subd. (a); see CALCRIM No. 1203.) The jury reasonably could conclude that Baker planned to asport the victim to commit the lewd act, not that he would molest her on the side of the road.

In sum, we reject Baker's claim that the evidence was insufficient because he purportedly lacked the specific intent to use force or fear to kidnap Jane. Reviewed in the light most favorable to the judgment, there is substantial evidence that Baker had the requisite intent and that he took direct but ineffectual acts to kidnap Jane for the purpose of committing a lewd act in violation of section 288.[11]

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[11] In addition to arguing the evidence is sufficient to support a conviction, the Attorney General relies on section 207, subdivisions (b) and (e), and cases discussing the amount of force required to kidnap an unresisting infant or child. Section 207, subdivision (b) provides: "Every person, who for the purpose of committing any act defined in Section 288, hires, persuades, entices, decoys, or seduces by false promises, misrepresentations, or the like, any child under the age of 14 years to go out of this country, state, or county, or into another part of the same county, is guilty of kidnapping." Section 207, subdivision (e) provides: "For purposes of those types of kidnapping requiring force, the amount of force required to kidnap an unresisting infant or child is the amount of physical force required to take and carry the child away a substantial distance for an illegal purpose or with an illegal intent." The trial court did not provide the instructions which correspond to these statutes. (See CALCRIM Nos. 1200, 1201.) Based on our conclusion that the evidence was sufficient to sustain a conviction under section 209, subdivision (b), we need not address the Attorney General's additional arguments.

II

Alleged Instructional Error: Failure to Instruct on Attempted False Imprisonment

Without identifying any evidence or providing record citations, Baker contends "the circumstantial evidence shows that appellant might have had the specific intent to detain [the victim] rather than asport her." Baker argues the trial court therefore erred in failing to instruct, sua sponte, on the lesser included offense of attempted false imprisonment. We reject Baker's claim of instructional error.

" '[A] lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser.' " (*People v. Smith* (2013) 57 Cal.4th 232, 240 (*Smith*), quoting *People v. Birks* (1998) 19 Cal.4th 108, 117-118, fn. omitted.) The trial court has a sua sponte duty to instruct on a lesser included offense "only when the evidence [of the lesser-included offense] is substantial enough to merit consideration by the jury." (*People v. Barton* (1995) 12 Cal.4th 186, 195, fn. 4.) "Such instructions are required only when there is substantial evidence that, if the defendant is guilty at all, he is guilty of the lesser offense, but not the greater." (*People v. Wyatt* (2012) 55 Cal.4th 694, 704 (*Wyatt*).) Any error in failing to instruct on a lesser included offense does not warrant reversal in this case unless "it appears 'reasonably probable' the defendant would have obtained a more favorable outcome had the error not occurred." (*People v. Breverman* (1998) 19 Cal.4th 142, 178 (*Breverman*); see *People v. Watson* (1956) 46 Cal.2d 818, 836.)

False imprisonment "is the unlawful violation of the personal liberty of another." (§ 236.) "If the false imprisonment [is] effected by violence, menace, fraud, or deceit," the crime is a felony. (§ 237, subd. (a).) False imprisonment is a lesser included offense of kidnapping. (*People v. Magana* (1991) 230 Cal.App.3d 1117, 1120-1121.) Citing *Magana*, the Attorney General concedes that attempted false imprisonment is a lesser included offense of attempted aggravated kidnapping. Assuming without deciding that this is correct, the evidence in this case does not support a finding that Baker was guilty *only* of attempted false imprisonment.

As previously set forth, the evidence demonstrated that Baker intended to kidnap Jane. The evidence further indicates he was attempting to do more than accomplish an unlawful detention or violation of the victim's personal liberty. (See *People v. Fernandez* (1994) 26 Cal.App.4th 710, 717 ["The essential element of false imprisonment, be it misdemeanor or felony, is restraint of the person."].) In the course of following Jane for several minutes, Baker tried to lure Jane into his rental car. The trunk of the car contained dildos and vibrators, like those Baker had previously used on his prior victim of a similar age. The evidence suggests Baker intended to move Jane a substantial distance for the purpose of committing a lewd act on her. Given that the incident occurred on a busy road, and cars were observed lined up behind Baker, unable to pass, the reasonable inference is that Baker intended to move Jane in his car to a more secluded location to commit a lewd act, not that he intended to merely detain Jane and stay at the side of the busy road. Because there was no substantial evidence Baker was merely

attempting to violate Jane's personal liberty, the trial court had no obligation to instruct on the offense of attempted false imprisonment. (*Wyatt*, *supra*, 55 Cal.4th at p. 704.)

Even if the trial court should have given an instruction on attempted false imprisonment, it is not reasonably probable that Baker would have realized a more favorable result had the instruction been given. (*Breverman*, *supra*, 19 Cal.4th at p. 178.) Notably, Baker fails to cite any evidence in the record to support his claim that he merely attempted to violate Jane's personal liberty as required for a false imprisonment offense. By contrast, as discussed *ante*, substantial evidence supports the jury's conclusion that Baker used the requisite force or fear in his attempt to lure Jane into his car to take her to a more secluded location for purposes of committing a lewd act on her.

III

Convictions for Possession of Child Pornography

Baker was convicted in count 4 of knowingly possessing child pornography (§ 311.11, subd. (a)) and in count 5 of knowingly possessing child pornography after having been previously convicted of an offense requiring registration as a sex offender (§ 311.11, subd. (b)). Baker argues, and the Attorney General concedes, that count 4 is a lesser included offense of count 5. We agree and therefore vacate Baker's conviction for count 4.

"Section 954 sets forth the general rule that defendants may be charged with and convicted of multiple offenses based on a single act or an indivisible course of conduct." (*People v. Pearson* (1986) 42 Cal.3d 351, 354, abrogated on another ground by *People v. Vidana* (2016) 1 Cal.5th 632, 651.) "However, an exception to this general rule allowing

multiple convictions prohibits multiple convictions based on necessarily included offenses." (*Medina*, *supra*, 41 Cal.4th at p. 701.) As stated *ante*, " 'a lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser. [Citations.]' " (*Smith*, *supra*, 57 Cal.4th at p. 240.)

Here, the only difference between the counts is that count 5 contains an additional required element—that Baker was required to register as a sex offender. (§ 311.11, subds. (a) & (b).) Thus, the greater offense of a violation of section 311.11, subdivision (b) cannot be committed without also committing a violation of section 311.11, subdivision (a). (See *Smith*, *supra*, 57 Cal.4th at p. 240.) " 'When the jury expressly finds defendant guilty of both the greater and lesser offense . . . the conviction of [the greater] offense is controlling, and the conviction of the lesser offense must be reversed.' " (*People v. Milward* (2011) 52 Cal.4th 580, 589.) Because possession of child pornography (count 4) is a lesser included offense of possession of child pornography with a prior conviction requiring registration as sex offender (count 5), we reverse Baker's conviction on count 4 and remand for resentencing.

IV

The Ten-year Enhancement for a Prior Serious Felony

At sentencing, the trial court imposed two indeterminate terms of 25 years to life, for a total indeterminate term of 50 years to life. The court then imposed a determinate term of 10 years for the enhancement under section 667, subdivision (a)(1) which

provides that "[a]ny person convicted of a serious felony who previously has been convicted of a serious felony . . . shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement." In imposing the 10 years, the court explained, "With respect to the 667[, subdivision] (a) count, the nickel priors, those are mandatory full [consecutive], five years each for the two indeterminate terms, for a determinate term of ten years in state prison."

Citing *In re Harris* (1989), 49 Cal.3d 131, 136 (*Harris*), Baker contends that only a single five-year term should have been imposed for the section 667, subdivision (a) enhancement because he had only one prior serious felony. We reject Baker's claim. Our Supreme Court has explained that "under the Three Strikes law, section 667[, subdivision] (a) enhancements are to be applied individually to each count of a third strike sentence." (*People v. Williams* (2004) 34 Cal.4th 397, 405 (*Williams*).) The trial court correctly imposed two five-year terms under section 667, subdivision (a), not because Baker had more than one prior serious felony, but because Baker was sentenced to two indeterminate life sentences under the Three Strikes law. (*Williams*, at p. 405.)[12]

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12 Baker's reliance on *Harris* is therefore misplaced; it does not matter that Baker's seven prior convictions were all tried in one case rather than " 'brought and tried separately.' " (*Harris*, *supra*, 49 Cal.3d at p. 136.) The holding in *Williams* controls here and allows imposition of a five-year sentencing enhancement under section 667, subdivision (a) for *each count of conviction in this case*, based on Baker's prior serious felony conviction.

V

Resentencing Under Amended Sections 667 and 1385

When the trial court sentenced Baker, section 667, subdivision (a), required it to impose a five-year sentence enhancement for his prior serious felony conviction and the trial court was prohibited from striking the enhancement under section 1385. Effective January 1, 2019, sections 667, subdivision (a) and 1385 were amended pursuant to Senate Bill No. 1393 to give the trial court discretion to impose or strike a prior serious felony conviction enhancement. (Stats. 2018, ch. 1013, §§ 1-2.)

Baker contends, and the Attorney General concedes, the amendments apply because Baker's conviction is not yet final. (See *In re Estrada* (1965) 63 Cal.2d 740, 744; *People v. Garcia* (2018) 28 Cal.App.5th 961, 973.) We agree and therefore remand for resentencing under sections 667 and 1385, as amended by Senate Bill No. 1393. We express no opinion on how the trial court should exercise its discretion.

DISPOSITION

The conviction on count 4 for knowingly possessing child pornography is reversed and the case is remanded for resentencing in accordance with this opinion. In all other respects, the judgment is affirmed.

GUERRERO, J.

WE CONCUR:

HALLER, Acting P. J.

IRION, J.